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2
3 UNITED STATES DISTRICT COURT

4 DISTRICT OF NEVADA

5 SLATER L. YOHEY,

Case No. 3:20-cv-00441-ART-CLB

6 v.

Petitioner,

ORDER

7 PERRY RUSSELL, et al.,

8 Respondents.

9
10 **I. SUMMARY**

11 This counseled habeas petition comes before the Court on Respondents'
12 motion to dismiss. (ECF No. 51 ("Motion").) Petitioner Slater L. Yohey ("Petitioner"
13 or "Yohey") opposed the Motion, and Respondents replied. (ECF Nos. 55, 62.) For
14 the reasons stated below, the Court grants the motion to dismiss, in part, and
15 denies it, in part.

16 **II. BACKGROUND**

17 Yohey challenges his 2016 state court conviction, pursuant to a guilty plea,
18 of two counts of robbery with the use of a deadly weapon, kidnapping in the first
19 degree, grand larceny of a motor vehicle, and eluding a police officer. (ECF No.
20 17-12.) Yohey was sentenced to an aggregate term of 15 to 53 years in prison.
(*Id.*) Yohey filed two *pro se* notices of appeal, but the Nevada Supreme Court
21 dismissed the appeals as untimely. (ECF No. 17-16.) Yohey filed a state petition
22 for post-conviction relief. (ECF No. 17-21.) The state district court denied Yohey's
23 petition, and the Nevada Supreme Court affirmed the denial. (ECF Nos. 17-34,
24 17-41.)

25 Yohey filed a *pro se* federal petition for a writ of habeas corpus. (ECF No.
26 1-1.) This Court appointed counsel, and Yohey filed a counseled first amended
27 petition and a counseled second amended petition. (ECF Nos. 6, 11, 16, 24.)

1 Respondents moved to dismiss the second amended petition. (ECF No. 34.) Yohey
 2 moved to strike the motion to dismiss or, in the alternative, moved for a more
 3 definite statement relating to Respondents' timeliness and relation back
 4 arguments. (ECF No. 40.) In their response to the motion to strike, Respondents
 5 agreed to submit a renewed motion to dismiss. (ECF No. 50.) This Court granted
 6 the motion to strike. (ECF No. 52.) In their renewed motion to dismiss,
 7 Respondents argue that Ground 4 is procedurally barred and Grounds 1 and 2
 8 are unexhausted. (ECF No. 51.)

9 **III. DISCUSSION**

10 **A. Procedural default of Ground 4**

11 **1. Legal standard**

12 Federal courts are barred from considering a state prisoner's habeas claim
 13 if the state courts denied his claim pursuant to an independent and adequate
 14 state procedural rule. *Edwards v. Carpenter*, 529 U.S. 446, 454–55 (2000). When
 15 a prisoner "procedurally defaults" a federal claim, judicial review is barred unless
 16 he can show either: (1) "cause for the default and actual prejudice as a result of
 17 the alleged violation of federal law," or (2) "that failure to consider the claims will
 18 result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S.
 19 722, 750 (1991). To demonstrate cause, a petitioner must show that some
 20 external and objective factor impeded his efforts to comply with the state's
 21 procedural rule. *Maples v. Thomas*, 565 U.S. 266, 280–81 (2012). Ignorance or
 22 inadvertence does not constitute cause. *Murray v. Carrier*, 477 U.S. 478, 486–87
 23 (1986). The Supreme Court has acknowledged that in certain circumstances
 24 counsel's ineffectiveness in failing properly to preserve a claim for review in state
 25 court will suffice as "cause." See *Edwards*. 529 U.S. at 451 (citing *Carrier*, 477
 26 U.S., at 488–489). To constitute "cause," counsel's performance must have been
 27 so ineffective as to violate the Federal Constitution. *Id.* To show prejudice, a
 28 petitioner bears the burden of showing not merely that the error created a

1 possibility of prejudice, but that the error worked to his actual and substantial
 2 disadvantage, infecting the entire proceeding with constitutional error. *Id.* at 494;
 3 *Bradford v. Davis*, 923 F.3d 599, 613 (9th Cir. 2019).

4 **2. Analysis**

5 Yohey acknowledges that Ground 4 is procedurally defaulted but argues
 6 that he can show cause and prejudice to overcome the default based on his claim
 7 that counsel was ineffective in failing to file a direct appeal despite his request.
 8 (ECF No. 55 at 9–10.)

9 In Ground 4, Yohey alleges that his due process rights under the Fifth and
 10 Fourteenth Amendments were violated when the sentencing court failed to
 11 consider the factors under NRS 193.165 on the record as required under Nevada
 12 state law. (ECF No. 24 at 12.) Yohey included this claim in his state petition for
 13 post-conviction relief, and the state district court denied it on the merits because
 14 “the Court carefully considered the factors outlined in NRS 193.165.” (ECF No.
 15 17-34.) In affirming the denial of Yohey’s state petition for post-conviction relief,
 16 the Nevada Supreme Court found that “[t]his claim fell outside the scope of claims
 17 permissible in a postconviction petition for a writ of habeas corpus challenging a
 18 judgment of conviction based upon a guilty plea. NRS 34.810(1)(a).” (ECF No. 17-
 19 41 at 3–4.) Consequently, because Ground 4 was denied by the Nevada Supreme
 20 Court on adequate and independent state procedural grounds, the procedural
 21 default doctrine applies here. *See Vang v. Nevada*, 329 F.3d 1069, 1073–75 (9th
 22 Cir. 2003).

23 Yohey argues that he can overcome the default of Ground 4 due to his
 24 counsel’s failure to file a notice of appeal. For ineffective assistance of counsel to
 25 function as cause to excuse a procedural default, the claim of ineffective
 26 assistance of counsel must be exhausted before the state courts as an
 27 independent claim. *See Edwards*, 529 U.S. at 453 (“[A] claim of ineffective
 28 assistance,’ we said, generally must ‘be presented to the state courts as an

1 independent claim before it may be used to establish cause for a procedural
2 default.” (citing *Murray*, 477 U.S. at 489).

3 In ground 1 of his state petition for post-conviction relief (which mirrors
4 Ground 3 of his operative federal amended petition), Yohey argued that “counsel
5 failed to file a timely notice of appeal from [his] judgment of conviction.” (ECF 17-
6 21 at 15-16.) Yohey alleged that he told his counsel after sentencing that he
7 wished to appeal, followed up with a written communication to his counsel from
8 prison, and received a letter from counsel telling him that he did not file a notice
9 of appeal, at which point he filed a pro se notice of appeal. (*Id.* at 15-16.) Yohey
10 alleged that he told counsel that he wanted to appeal his judgment of conviction
11 to address “Constitutional issues” and several sentencing issues, including
12 “Abuse of Discretion at Sentencing; Restitution Errors,” “Enhancement Penalty
13 Errors,” and “Redundancy Issues in the Multiple Sentences.” (*Id.* at 15).

14 At the evidentiary hearing, the state district court considered the
15 correspondence regarding Yohey’s desire to appeal. (See ECF No. 17-33 at 26,
16 40.) Yohey provided the letter he sent to his counsel, Mr. Petty, in which he asked
17 about appealing his sentence. (ECF No. 17-31 at 6.) Although Yohey’s letter to
18 his counsel is illegible, his interest in appealing is apparent from the email Mr.
19 Petty sent to co-counsel, Mr. Fortier, in which Mr. Petty relayed that Yohey asked
20 about possible sentencing issues for appeal, concluding, “In sum, do you believe
21 issues exist for appeal?” (*Id.* at 9.) Mr. Fortier responded that there were no issues
22 to appeal, and that Yohey had not asked him to appeal. (*Id.*) Mr. Petty then replied
23 to Yohey telling him, after discussing various sentencing concerns, “Thus there
24 are no issues here for appeal and I cannot help you.” (*Id.* at 4.) As Yohey alleged
25 in his state petition for post-conviction relief, he received Mr. Petty’s letter after
26 the expiration of the thirty-day deadline for filing a notice of appeal. See
27 Judgment, dated June 9, 2016 (ECF No. 17-12); Letter from Mr. Petty, dated July
28 6, 2016 (ECF No. 17-31 at 4); Petition for Writ of Habeas Corpus (ECF 17-21 at

1 15) (alleging that Mr. Petty's July 6 letter was post-marked July 12, 2016, and
 2 received by Yohey on July 18, 2016).

3 The district court denied ground 1 on the merits, crediting Mr. Petty and
 4 Mr. Fortier's testimony that no direct appeal was filed due to Yohey's "failure to
 5 request one." (ECF 17-34 at 7.) The state district court further found that Yohey
 6 could not show prejudice because he had "not identified any meritorious claims
 7 for appeal." (*Id.*.)

8 In his appeal to the Nevada Supreme Court, Yohey argued that the state
 9 district court erred in finding that his counsel was not ineffective "for failing to
 10 effectuate an appeal." (ECF No. 17-38 at 14.) In arguing prejudice from his
 11 counsel's failure to effectuate an appeal, Yohey explicitly argued that his counsel
 12 could have raised the claim alleged in Ground 4—that the state district court
 13 violated due process by failing to consider the NRS 193.165 factors at his
 14 sentencing hearing—if counsel had effectuated an appeal. (*Id.* at 17.) Yohey
 15 explained that his counsel was deficient under *Strickland* in failing to perfect an
 16 appeal and he was prejudiced by that failure because counsel could have raised
 17 Ground 4 on direct appeal. (*Id.*) In other words, but for counsel's ineffectiveness,
 18 Yohey would not have defaulted Ground 4.

19 To overcome procedural default, a petitioner must show that his ineffective
 20 assistance of counsel claim was "presented to the state courts as an independent
 21 claim" and is meritorious, *i.e.*, showing that counsel was "so ineffective as to
 22 violate the Federal Constitution." *Edwards*, 529 U.S. at 451. The court finds that
 23 Yohey sufficiently presented in state court his claim that Ground 4 was
 24 procedurally defaulted due to ineffective assistance of counsel in failing to raise
 25 Ground 4 on direct appeal. As to the merits of that ineffective assistance claim,
 26 the alleged ineffectiveness involved the same conduct alleged in Ground 3 of his
 27 federal amended petition. In *Visciotti v. Martel*, 862 F.3d 749, 768-769 (9th Cir.
 28 2016), the court held that a court may consider *de novo* whether a claim of

1 ineffective assistance of counsel constitutes cause and prejudice to excuse
 2 procedural default. *Id.* at 769 (observing that courts apply a “differing standard
 3 for evaluating constitutional error as a substantive basis of relief and as a cause
 4 to avoid default of other claims”). In other words, a claim of ineffective assistance
 5 based on failure to file a notice of appeal could suffice to overcome procedural
 6 default (based on a de novo standard of review) but the same conduct may or may
 7 not entitle the petitioner to habeas relief under AEDPA. While the Court could
 8 consider the merits of Ground 3 as a basis for overcoming procedural default, the
 9 factual and legal basis for that claim have not been fully briefed. The Court
 10 therefore defers until the merits stage a decision on whether the ineffective
 11 assistance alleged in Ground 3 constitutes cause to overcome the procedural
 12 default of Ground 4 based on a de novo standard of review per *Visciotti* and, if so,
 13 whether it grounds for habeas relief under 28 U.S.C. 2254(d).

14 **B. Exhaustion of Grounds 1 and 2**

15 Respondents argue that Grounds 1 and 2 are unexhausted. (ECF No. 51 at
 16 7.) In Ground 1, Yohey alleges that his counsel failed to investigate or present
 17 mitigation at his sentencing in violation of the Fifth, Sixth, and Fourteenth
 18 Amendments. (ECF No. 24 at 5.) And in Ground 2, Yohey alleges that his counsel
 19 failed to object during sentencing to the state district court’s failure to consider
 20 all of the factors under NRS 193.165 on the record as required under Nevada
 21 state law in violation of the Fifth, Sixth, and Fourteenth Amendments. (*Id.* at 7.)

22 **1. Legal standard**

23 A state prisoner first must exhaust state court remedies on a habeas claim
 24 before presenting that claim to the federal courts. 28 U.S.C. § 2254(b)(1)(A). This
 25 exhaustion requirement ensures that the state courts, as a matter of comity, will
 26 have the first opportunity to address and correct alleged violations of federal
 27 constitutional guarantees. *Coleman*, 501 U.S. at 730–31. “A petitioner has
 28 exhausted his federal claims when he has fully and fairly presented them to the

1 state courts.” *Woods v. Sinclair*, 764 F.3d 1109, 1129 (9th Cir. 2014) (citing
 2 *O’Sullivan v. Boerckel*, 526 U.S. 838, 844–45 (1999) (“Section 2254(c) requires
 3 only that state prisoners give state courts a *fair* opportunity to act on their
 4 claims.”)). To satisfy the exhaustion requirement, a claim must have been raised
 5 through one complete round of either direct appeal or collateral proceedings to
 6 the highest state court level of review available. *O’Sullivan*, 526 U.S. at 844–45;
 7 *Peterson v. Lampert*, 319 F.3d 1153, 1156 (9th Cir. 2003) (en banc). A properly
 8 exhausted claim “must include reference to a specific federal constitutional
 9 guarantee, as well as a statement of the facts that entitle the petitioner to
 10 relief.” *Woods*, 764 F.3d at 1129 (quoting *Gray v. Netherland*, 518 U.S. 152, 162–
 11 63 (1996)); *Castillo v. McFadden*, 399 F.3d 993, 999 (9th Cir. 2005) (fair
 12 presentation requires both the operative facts and federal legal theory upon which
 13 a claim is based).

14 **2. Analysis**

15 Yohey admits that Grounds 1 and 2 have not been exhausted, but he
 16 argues that (1) they are technically exhausted and procedurally defaulted, and
 17 (2) he can overcome the procedural default pursuant to *Martinez v. Ryan*. (ECF
 18 No. 55 at 4.)

19 A claim may be considered procedurally defaulted if “it is clear that the
 20 state court would hold the claim procedurally barred.” *Sandgathe v. Maass*, 314
 21 F.3d 371, 376 (9th Cir. 2002). Yohey would face several procedural bars if he
 22 were to return to state court. *See, e.g.*, Nev. Rev. Stat. §§ 34.726 & 34.810. Nevada
 23 has cause and prejudice and fundamental miscarriage of justice exceptions to its
 24 procedural bars, which are substantially the same as the federal standards. If a
 25 petitioner has a potentially viable cause-and-prejudice or actual-innocence
 26 argument under the substantially similar federal and state standards, then
 27 petitioner cannot establish that “it is clear that the state court would hold the
 28 claim procedurally barred.” *Sandgathe*, 314 F.3d at 376. For that reason, the

1 courts in this district have generally declined to find a claim subject to
 2 anticipatory procedural default unless the petitioner represents that he would be
 3 unable to establish cause and prejudice in a return to state court. In such a case,
 4 the claim would generally be subject to immediate dismissal as procedurally
 5 defaulted, as the petitioner would have conceded that he has no grounds for
 6 exception to the procedural default in federal court.

7 A different situation is presented, however, where the Nevada state courts
 8 do not recognize a potential basis to overcome the procedural default arising from
 9 the violation of a state procedural rule that is recognized under federal law. In
 10 *Martinez v. Ryan*, 566 U.S. 1 (2012), the Supreme Court held that the absence or
 11 inadequate assistance of counsel in an initial-review collateral proceeding may
 12 be relied upon to establish cause excusing the procedural default of a claim of
 13 ineffective assistance of trial counsel. *Id.* at 9. The Nevada Supreme Court does
 14 not recognize *Martinez* as cause to overcome a state procedural bar under Nevada
 15 state law. *Brown v. McDaniel*, 331 P.3d 867, 875 (Nev. 2014). Thus, a Nevada
 16 habeas petitioner who relies upon *Martinez*—and only *Martinez*—as a basis for
 17 overcoming a state procedural bar on an unexhausted claim can successfully
 18 argue that the state courts would hold the claim procedurally barred but that he
 19 nonetheless has a potentially viable cause-and-prejudice argument under federal
 20 law that would not be recognized by the state courts when applying the state
 21 procedural bars.

22 Here, Yohey advances only *Martinez* as a basis for excusing the anticipatory
 23 default of Grounds 1 and 2. (See ECF No. 55 at 4 n.4.) Accordingly, the Court
 24 grants Yohey’s request to consider Grounds 1 and 2 technically
 25 exhausted. Because the cause-and-prejudice questions of Grounds 1 and 2 are
 26 necessarily connected to the merits of Grounds 1 and 2, the Court will defer a
 27 determination until the time of merits determination. Accordingly, the motion to
 28 dismiss Grounds 1 and 2 as exhausted, or alternatively procedurally defaulted,

1 is denied without prejudice. Respondents may renew the procedural default
2 argument in their answer.

3 **V. CONCLUSION**

4 It is therefore ordered that Respondents' motion to dismiss (ECF No. 51) is
5 granted as follows: (1) Ground 4 is procedurally defaulted, and (2) Grounds 1 and
6 2 are technically exhausted, but procedurally defaulted.

7 It is further ordered that the Court defers consideration until after the filing
8 of an answer and reply in this action of (1) whether Yohey can demonstrate the
9 ineffective assistance of counsel alleged in Ground 3 to demonstrate cause to
10 overcome the procedural default of Ground 4 and (2) whether Yohey can
11 demonstrate cause and prejudice under *Martinez v. Ryan*, 566 U.S. 1 (2012) to
12 overcome the procedural default of Grounds 1 and 2.

13 It is further ordered that Respondents must file an answer to the second
14 amended petition within 60 days of the date of this order. Yohey will have 60 days
15 from service of the answer within which to file a reply.

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DATED THIS 24th day of March 2023.

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ANNE R. TRAUM
UNITED STATES DISTRICT JUDGE

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